

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

Original & Appellant of Mailing

77-1195

To be argued by
BARRY E. SCHULMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1195

UNITED STATES OF AMERICA,

Appellee,

—against—

JOSEPH JAMES JACOBS,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York

HARVEY M. STONE,
BARRY E. SCHULMAN,
Assistant United States Attorneys,
(Of Counsel).

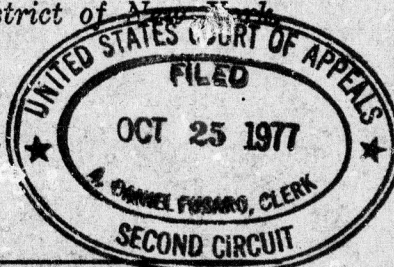




TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	2
A. The Government's Case	2
B. The Defense Case	7
ARGUMENT:	
POINT I—The District Court Properly Discharged Its Judicial Functions And Did Not Deny Ap- pellant A Fair Trial	8
POINT II—The Government's Rebuttal Was Proper	9
POINT III—The Evidence Seized From The Ford Automobile Was Properly Admitted Into Evi- dence	11
A. The Hearing	11
B. Appellant Does Not Have Standing To Contest The Search	14
C. The Car That Toth Was Driving Was Legally Stopped And The Subsequent Search Was Reasonable Under The Fourth Amend- ment	15
POINT IV—The Testimony Of The Accomplice Toth Was Properly Admitted Into Evidence	18
POINT V—Evidence Of Subsequent Similar Acts Was Properly Admitted By The District Court	19

	PAGE
POINT VI—Defendant's Remaining Arguments Are Frivolous	21
CONCLUSION	22

TABLE OF AUTHORITIES

Cases:

<i>Adams v. Williams</i> , 407 U.S. 143 (1972)	15, 16, 17
<i>Alderman v. United States</i> , 394 U.S. 165 (1969) ...	15
<i>Brown v. United States</i> , 411 U.S. 223 (1973)	14
<i>Chimel v. California</i> , 395 U.S. 752 (1969)	17
<i>Gustafson v. Florida</i> , 414 U.S. 260 (1973)	17
<i>Terry v. Ohio</i> , 392 U.S. 1 (1968)	15
<i>United States v. Agueci</i> , 310 F.2d 817 (2d Cir. 1962), cert. denied, 372 U.S. 959 (1963)	11
<i>United States v. Baker</i> , 419 F.2d 83 (2d Cir. 1969), cert. denied, 397 U.S. 971 (1970)	20
<i>United States v. Bennett</i> , 409 F.2d 888 (2d Cir. 1969), cert. denied, 396 U.S. 852 (1969)	20
<i>United States v. Bozzo</i> , 365 F.2d 206 (2d Cir. 1966)	15, 20
<i>United States v. Brettholtz</i> , 485 F.2d 483 (2d Cir. 1973), cert. denied sub nom <i>Santiago v. United States</i> , 415 U.S. 976 (1974)	20
<i>United States v. Bugnoni-Ponce</i> , 422 U.S. 873 (1975)	16
<i>United States v. Byrd</i> , 352 F.2d 570 (2d Cir. 1965)	20
<i>United States v. Campanile</i> , 516 F.2d 288 (2d Cir. 1975)	20
<i>United States v. Crane</i> , 499 F.2d 1385 (6th Cir. 1974)	17

	PAGE
<i>United States v. Curcio</i> , 279 F.2d 681 (2d Cir. 1960), cert. denied, 364 U.S. 824 (1960)	8
<i>United States v. Deaton</i> , 381 F.2d 114 (2d Cir. 1967)	19
<i>United States v. Diorio</i> , 451 F.2d 21 (2d Cir. 1971), cert. denied, 405 U.S. 955 (1972)	19
<i>United States v. Galante</i> , 547 F.2d 733 (2d Cir. 1976)	15
<i>United States v. Gerry</i> , 515 F.2d 130 (2d Cir. 1975), cert. denied, 423 U.S. 832 (1975)	19
<i>United States v. Gonzales-Rodriguez</i> , 513 F.2d 928 (9th Cir. 1975)	17
<i>United States v. Guidarelli</i> , 318 F.2d 523 (2d Cir. 1963)	11
<i>United States v. Keilly</i> , 445 F.2d 1285 (2d Cir. 1971)	19
<i>United States v. Klugman</i> , 506 F.2d 1378 (8th Cir. 1974)	17
<i>United States v. Lewis</i> , 423 F.2d 457 (8th Cir. 1970)	11
<i>United States v. Maddox</i> , 913 F. Supp. 60 (W.D. Okla., 1976)	18
<i>United States v. Magda</i> , 547 F.2d 756 (2d Cir. 1976)	16
<i>United States v. Marshall</i> , 499 F.2d 76 (5th Cir. 1974)	18
<i>United States v. Masterson</i> , 383 F.2d 610 (2d Cir. 1967)	14
<i>United States v. Nathan</i> , 476 F.2d 456 (2d Cir. 1973), cert. denied, 414 U.S. 823 (1973)	19, 20
<i>United States v. Nazzario</i> , 472 F.2d 302 (2d Cir. 1973)	8
<i>United States v. Robinson</i> , 414 U.S. 218 (1973) ...	17

<i>United States v. Sacco</i> , 436 F.2d 780 (2d Cir.), <i>cert. denied</i> , 404 U.S. 834 (1971)	15
<i>United States v. Super</i> , 492 F.2d 319 (2d Cir. 1974), <i>cert. denied sub nom Burns v. United States</i> , 419 U.S. 876 (1974)	19, 20
<i>United States v. Tourine</i> , 428 F.2d 865 (2d Cir. 1970)	8
<i>United States v. Zaicek</i> , 519 F.2d 412 (2d Cir. 1975)	18
<i>Statutes:</i>	
Title 18, United States Code, Section 2113(a) and (d)	1
Title 18, United States Code, Section 371	1
F.R. Crim. Pro. Rule 41(e)	14
N.Y. Vehicle and Traffic Law, Section 423(3) (McKinneys Consol Laws C. 71, 1970)	18
<i>Other Authorities:</i>	
Fed. R. Evid. 404(b)	19, 20

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1195

UNITED STATES OF AMERICA,

Appellee,

—against—

JOSEPH JAMES JACOBS,

Appellant.

BRIEF FOR APPELLEE

Preliminary Statement

This is an appeal from judgment of conviction entered in the United States District Court for the Eastern District of New York (Costantino, J.), following a jury trial, convicting appellant Joseph J. Jacobs of the armed robbery on July 27, 1976 of the Citibank, 35-31 Francis Lewis Boulevard, Queens, New York (Counts One and Two), in violation of Title 18, United States Code, Section 2113(a) and (d), and conspiracy to commit bank robbery (Count Three), in violation of Title 18, United States Code, Section 371. On April 1, 1977, Jacobs was sentenced to a twelve-year term of imprisonment on count two (charging, *inter alia*, that appellant had placed lives in jeopardy during the robbery), to run concurrently with a five-year term of imprisonment imposed on the conspiracy count. Imposition of sentence on count one (charging bank robbery by force and intimidation) was

suspended, and count one was merged with count two. Appellant is presently in custody serving his sentence.

In arguing that his conviction should be reversed, appellant contends that the district court unfairly assisted the prosecutor during the trial, that the prosecutor made improper comments during his summation, and that certain evidence should have been excluded.

Statement of Facts

A. The Government's Case

The Government's case consisted principally of the testimony of unindicted co-conspirator Brian Toth coupled with extensive corroborative evidence.

In mid-July 1976, Joseph "Jimmy" Jacobs, the appellant herein, approached Brian Toth, an old friend, with a plan to commit a series of robberies. An initial bank robbery was to finance preparations for subsequent more ambitious robberies (51-54).¹ Also present at this meeting was another acquaintance of appellant, one Joseph Giannone, who was to steal the car which would be used in the initial bank robbery (54). Appellant, Toth, and Giannone met on a Sunday, July 25, 1976, to select the target bank (54). Appellant suggested that the group look first at a branch of Bank of America on Northern Boulevard in Queens, the borough in which he had grown up (55). That particular bank was abandoned as a target because on close inspection the group discovered that a glass panel between the tellers' counter and the ceiling would prevent anyone from vaulting the counter (56). An alternate bank was selected (56). Early the next morning the trio met at the apartment where Toth

¹ Numerical references are to pages of the trial transcript unless otherwise indicated.

was staying in Brooklyn, drove out to Queens, and began to look for a car to steal (57). Because Giannone's attempts to steal a car at that time were unavailing, the robbery was abandoned for that day (57-52).

Although the group had three pistols, appellant thought that an additional weapon "would come in handy" (58). Toth borrowed a sawed-off shot gun but since they had only one shell for it, the trio decided to purchase more shells. Unable to purchase ammunition within the city limits without a permit, the group drove to Yonkers where appellant purchased the shells at a sporting goods store (59-60).

Later that day, Giannone and Toth stole a car and drove it to a selected "switch site", where the trio planned to abandon the stolen car and transfer to another vehicle (60-61). During that evening, however, it became apparent that Giannone would not go through with his part as driver in the robbery that had been planned for the next day, July 27. Appellant at first wanted to force Giannone to fulfill his agreement, but finally decided to let Giannone withdraw in return for the loan of his car, a Cadillac (62).

Appellant and Toth left Toth's residence early the next morning to carry out the crime by themselves (63). They changed the target bank, however, to prevent Giannone from informing law enforcement authorities of their plan (64). After they selected the Citibank branch at 35-31 Francis Lewis Boulevard in Queens, Toth drove the stolen car to a switch site closer to the bank. They then transferred the weapons, gloves, masks, and a bag for the money into the stolen car and drove to the bank (64-65).

The first time Jacobs and Toth approached the bank, they drove past it in order to survey the bank and its

surrounding parking lot (65). On their second approach appellant ran into the bank, brandishing the sawed-off shotgun in his hands, with a pistol stuffed in his waistband, and a watch cap with eye holes cut into it pulled over his face and head (66, 20). Between curses at the employees and patrons in the bank, he announced that a robbery was taking place and that everyone was to stand still (20-21). He handed a bag which he was carrying to the first teller, Henry Martin, and told him that he had fifteen seconds to fill it up. After Martin emptied his drawer into the bag, he handed it back to appellant. The second teller had dropped to the floor when she heard that a robbery was in progress. Accordingly, appellant directed Michael Visconti, the Operations Supervisor of the branch, to come forward to the second teller station and told him to place the contents of the second teller's drawer into the bag (21-22). Visconti leaned over the crouching teller and emptied her drawer. Included in the contents of the drawer was a package of "bait money", consisting of a number of five-dollar bills with serial numbers that had been recorded previously (20-31). Teller Henry Martin advanced to reach the alarm while Visconti was putting the money in the bag, but appellant noticed his movement and threatened to kill him if he took another step. To back up his threat, appellant picked a sign off the counter and threw it at Martin (21-22). Appellant then picked up the bag, exited the bank, entered the car in which Toth was waiting and rode off with his accomplice (22).

After reaching the switch site, appellant and Toth drove off in the Cadillac. They changed their shirts in the car as they made their escape through the Bronx, and tossed the clothing they had worn during the robbery over a fence into a vacant lot (68). When they returned to Toth's residence, they divided evenly the proceeds of the robbery, one thousand nine hundred and ninety-seven dollars and ninety-five cents (\$1,997.95). Appellant told Toth that

he was disappointed by the small take and would use part of his share to purchase equipment "for the next job" (69).

The second robbery was to take place the following Monday, August 2 (69). On Friday, July 30, appellant called Toth to tell him that he had a "slam hammer," a device often used to remove ignition locks, for Toth to use in stealing a car for that robbery (70). A third person, Steven Seifert, had been recruited as the driver and was present when appellant and Toth met on Sunday, August 1, to select the target bank (70). Their original thought was to pick another bank in Queens (71), but appellant thought they should go somewhat farther afield. Toth suggested Westchester, the Mount Vernon-Yonkers area in particular, because he was familiar with it (72). The Bank of America branch on Bronx River Road was selected as the target and the getaway route and "switch site" mapped out (72). Later that day, a blue Ford automobile stolen by Toth was moved to Yonkers and positioned at the switch site (73).

Appellant, Seifert and Toth arrived in Yonkers about 8:00 a.m. the next morning, August 2. Since it was too early to commit the robbery, they stopped for breakfast (75). Then the trio drove to the "switch site", loaded the masks, weapons and an airline bag into the stolen car, and drove toward the bank (75). Appellant and Toth donned the masks and armed themselves (76). They drove past the bank twice, each time deciding to delay execution of the robbery because they noticed a number of people in front of the bank (76). The group then drove back to the "switch site". When they reached the site, however, Toth noticed a Yonkers police car surveilling their parked car, Giannone's Cadillac (77). Toth told appellant and Seifert to take the Cadillac and leave the area while he drove the stolen Ford in the opposite direction (77-78).

The testimony of law enforcement officers disclosed in this regard that Yonkers Police Officer Ralph Forella was on patrol with his partner, Officer Fred Hollywood, on the morning of August 2, 1977, when they observed three white men at about 9:00 a.m. driving on Bronx River Road and noted that they were behaving suspiciously (146). At 10:30 a.m. the officers noticed the same car, Giannone's Cadillac, parked at the "switch site" in an area of Yonkers where a large number of burglaries had occurred. Officer Forella decided both to watch the car and to see if burglars emerged from any of the houses nearby. While he was waiting, however, a blue Ford pulled up with the same three males whom he had earlier seen riding in the Cadillac. Jacobs and Seifert got out, walked to the Cadillac car, and drove away (147). Forella requested assistance on his radio and Detective Armando DeBlassis responded to the call. Officer Forella briefed Detective DeBlassis, and then all the officers drove off to look for the two cars and their occupants (149-149a).

Driving in the direction Toth had taken, Detective DeBlassis soon located the Ford with Toth behind the wheel. He signalled Toth to pull over and then asked him for identification. When Toth could not produce either a driver's license or registration for the vehicle, Detective DeBlassis—who had also noted that the ignition switch on the Ford had been pulled out and that Toth was wearing gloves on a hot day (85°)—arrested him for driving without a license and registration (183-86). Detective DeBlassis notified Officer Forella that he had the Ford and its occupant in custody and requested that Officer Forella pick up appellant and Seifert, whom Detective DeBlassis had seen walking on the street earlier (186). The patrolmen soon drove up to Detective DeBlassis' location with appellant and Seifert in the back seat of the patrol car (187). The officers searched the Ford and found a revolver, a sawed-off shotgun, and an airline bag containing masks, gloves, walkie-talkies, and ammunition (188).

Detective DeBlassis responded to a call the next day from a woman who resided in the area where appellant and Seifert had been walking. There he was shown a white plastic bag in her yard. In the plastic bag were two hand guns, a wallet containing \$93.00 and some personal papers, and some shotgun shells (193, 209-210).² Among the papers was a rent receipt made out to "Jim Jacobs" and a tailor's receipt in the name of "J. Jacobs" (205). Special Agent Jack Oliver of the Federal Bureau of Investigation testified that his examination of these papers revealed Jacob's fingerprints on three of the papers (225). Several of the five-dollar bills in this wallet matched the recorded serial numbers of the "bait money" taken from the Citibank during the robbery on July 27 (205-06). A fingerprint of Jacobs was also found in a small phone book in the wallet. This book contained the phone numbers of both Brian Toth and Joseph Giannone (Government Exhibit 40).

B. The Defense Case

Appellant called only one witness in his own behalf, a convict, Daniel McCaffrey who had met Toth and Jacobs in prison. McCaffrey testified that Toth had told him that he was desperate to get out of jail (247-254).

² During a suppression hearing appellant admitted that he had placed these items there (p. 18).

ARGUMENT

POINT I

The District Court Properly Discharged Its Judicial Functions And Did Not Deny Appellant A Fair Trial.

Citing isolated parts of the record, appellant argues (Br. 6-8) that the district court acted in a biased fashion. Thus, appellant claims that the court aided the prosecutor's case by asking questions of government witnesses, seeking to clarify evidence introduced and refusing to keep an open mind regarding the admission of testimony. We submit that appellant's argument is without merit.

While it is generally accepted that a judge is an impartial arbiter, a "district judge is more than a moderator or umpire and has an active responsibility to see that a criminal trial is fairly conducted. Hence he will often have a duty to participate actively to that end. . . ." *United States v. Curcio*, 279 F.2d 681, 682 (2d Cir. 1960), cert. denied, 364 U.S. 824 (1960). It is true that a trial judge is precluded from "interfering for a merely partisan purpose" (*id.*) or from conveying to the jury that he did not believe particular witnesses. *United States v. Nazzario*, 472 F.2d 302 (2d Cir. 1973). He is not prohibited, however, from questioning witnesses to a reasonable degree in order to clarify testimony or from commenting upon the evidence introduced and the inferences to be known therefrom. *United States v. Tourine*, 428 F.2d 865, 869 (2d Cir. 1970).

In light of these principles, the district court's actions in the case at bar were well within the bounds of judicial discretion. Appellant's specific examples of judicial misconduct are, on their face, hardly worthy of response. For example, when inquiring whether there were mark-

ings to identify an American Express bag (see Appellant's Brief, p. 6), the judge was simply attempting to clarify the evidence being introduced (91-92). Similarly, in questioning Officer Forella (see Appellant's Brief, p. 6), the judge was trying to elicit the sequence of events which occurred so as to clarify any confusion the jury might have experienced (152-3, 171). Nowhere in the proceedings of the case at bar did the district judge reflect a pro-Government bias or improperly convey to the jury his own views of the evidence.

In fact, in his precharge, the judge cautioned the jury that they were not to infer any opinion of the court. As the judge stated (10):

"[A]t no time should you attempt to determine what the Court's opinion is as to anything that is happening in the courtroom, as to whether he has any opinion of the testimony of the witnesses, whether he has any opinion as to the nature of the case itself. I have no opinion. I will try very, very hard not to give you any semblance that I have any opinion".

Finally, while we believe that the District Court's comments were plainly appropriate, in light of the overwhelming evidence conclusively demonstrating appellant's guilt, any impropriety was harmless. Accordingly, appellant was not deprived of a fair trial.

POINT II

The Government's Rebuttal Was Proper.

Appellant also argues that certain allegedly improper remarks of the prosecutor had an "intolerably prejudicial impact" on the jury. Specifically, noting that there is no record evidence of the accomplice Toth's height and

(erroneously) that the jury never observed him standing, appellant points to the following comment of the prosecutor during his summation on rebuttal (300):

[Defense counsel] points to Mr. Toth saying maybe he went into the bank, he has broad shoulders. Look at his height. It is 5 foot eight inches. I ask you to use your observation.

There is no merit to appellant's claim that this comment warrants a reversal.

Defense counsel, in his summation, had argued that it was Toth and not appellant who entered the bank on July 27, 1976 (297). This assertion was clearly in contradiction to the testimony presented by the bank employee, Michael Visconti, who testified that under no circumstances was the bank robber taller than five feet five inches (5'5") (22). Mr. Visconti's testimony was supported by the photographs of the robbery, which showed that Visconti, who is 5'8" tall (41), was much taller than the robber (Government Exhibit 2). Thus, to counter defense counsel's assertion that it was Toth who entered the bank, the Government, in rebuttal, called on the jury to use their observations of Toth to determine whether or not Toth could possibly have been the bank robber (299-300). The Government further argued that at five feet five inches (Government Exhibit 46) appellant's height was that of the robber. Contrary to appellant's assertions, the jurors had been able to observe Toth's height. They had viewed Toth for a substantial period of time while he was testifying and on several occasions had seen him enter and leave the courtroom. It was clear that the jury had adequate time to determine that Toth was taller than the individual who robbed the bank.

Furthermore, the jury was cautioned in the judge's charge that the statements of both the Government and defense attorneys, in their openings and summations,

were not to be taken as evidence (304), and in fact the Assistant United States Attorney also so cautioned the jury during his summation (270-271). Thus, any arguable impropriety on the part of the Government's attorney was cured by the trial judge's instruction. *United States v. Agueci*, 310 F.2d 817 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (196). Moreover, since the evidence proving the guilt of the defendant was overwhelming, there is no substantial possibility that the isolated statement in question here could have affected the verdict. *United States v. Lewis*, 423 F.2d 457 (8th Cir. 1970); *United States v. Guidarelli*, 318 F.2d 523 (2d Cir. 1963).

POINT III

The Evidence Seized From The Ford Automobile Was Properly Admitted Into Evidence.

Appellant also contends (Br. 10-13) that the district court should have granted his motion to suppress the evidence seized on August 2, 1976, from the stolen Ford driven by his accomplice Toth. See p. 6, *supra*. This contention must also fail since, as we show below, appellant did not have standing to contest the search and, in any event, the search was valid and proper.

A. The Hearing

On February 2, 1977, appellant testified in his own behalf at a hearing on the question of standing. Appellant testified that on August 2, 1976, he drove with Brian Toth and Steven Seifert in the early morning hours from Brooklyn to Yonkers in Westchester County. Before leaving appellant placed a 20 gauge sawed off shotgun, a 9 millimeter Smith & Wesson automatic pistol, two .32 caliber pistols, a few pairs of gloves, 3 ski masks, a blue airline bag, a small stopwatch, and a pair of citizen band

radios in a car borrowed by Toth (13-16). Appellant, Toth, and Seifert then drove in Giannone's Cadillac to a "switch site" where a stolen Ford had been placed the night before (22). Upon arriving at the site, appellant placed the 20 gauge Winchester shotgun, two .32 caliber pistols, the 9 millimeter Smith & Wesson automatic pistols, two ski masks, one pair of black leather gloves, a pair of surgical gloves and the walkie talkies in the stolen Ford (16). He, Toth and Seifert then drove off in the stolen Ford (16-1). Sometime thereafter they returned to the "switch site" only to realize that they were being followed by a Yonkers Police Patrol Car. Appellant and Seifert drove off in the Cadillac, while Toth drove in another direction in the stolen Ford. Appellant left behind in the stolen Ford the sawed-off shotgun, 15 rounds of ammunition, shotgun shells, the stopwatch, 2 Citizen-Band radios, 3 ski masks, the American Airlines bag, and at least one pair of gloves (27-29). Appellant and Seifert abandoned the Cadillac and, while walking on the street, were picked up by Officers Forella and Hollywood and then driven to a location where Officer DiBlassis had Toth in custody (18-21).

The stolen Ford was searched while appellant remained seated in the patrol car (19-21; 33-34). Based on appellant's testimony Judge Costantino found that appellant had met his initial burden of showing standing (36).

Thereafter Armando DiBlassis was called to the stand by the government. DiBlassis testified that he had recently retired from the Yonkers Police Department with the rank of detective after 22 years of service, specializing in auto theft and homicide. On the morning of August 2, 1977, DiBlassis was still employed by the Yonkers Police Department and was ordered to meet with Officers Forella and Hollywood at Springer Avenue and Brandon Road at approximately 10:30 a.m. Once there, DiBlassis was told by the patrolmen that they had been

following a Cadillac and a Ford because the three men occupying those cars had been acting in a suspicious manner (40). After receiving the vehicle descriptions DiBlassis soon found the Ford driven by Toth and pulled the car over. No one else was present in the car (37-40).

DiBlassis asked Toth for his license and registration. Toth stated that he did not have these documents (41). At the same time DiBlassis observed that the ignition of the Ford had been removed, a method frequently employed during the theft of a motor vehicle. DiBlassis also found it significant that, although the temperature was 85 degrees, Toth was wearing gloves. DiBlassis placed Toth under arrest for driving without a license and failure to produce a registration, and notified his dispatcher that he had Toth in custody. Communications responded that they had determined that the Ford was stolen. DiBlassis requested that the patrol car pick up appellant and Seifert, and was told that they were already in custody and that the patrol car would arrive shortly (40-42, 46). When the patrol car arrived, appellant and Seifert remained handcuffed in the back of the patrol car while Toth was frisked and handcuffed and the stolen Ford searched (53-54).

The district court found that the search was valid and the evidence seized should not be suppressed. It further held that the search was not one involving the defendant (63). The court thereby further reflected its final conclusion, based on all the evidence, that appellant had no standing to move to suppress the evidence seized from the stolen Ford.

B. Appellant Does Not Have Standing To Contest The Search

At the outset it should be noted that appellant was not in the stolen Ford or near the car when it was searched and had not ridden in it for some period of time. Nor does appellant claim that he had a possessory interest in the stolen vehicle, and in fact he acknowledges that he knew it was stolen when he placed the seized items in it (22). It is clear therefore that Jacobs had no legitimate expectation of privacy in the vehicle. Moreover, the evidence at trial showed that the sawed-off shotgun which linked appellant to the July 27, 1976, robbery (see p. 3, *supra*) belonged to Toth and was not borrowed by appellant as he claimed at the suppression hearing (58-59).

The defendant has the burden of showing that he has standing to challenge the legality of the seizure and the admissibility of the evidence seized. *United States v. Masterson*, 383 F.2d 610, 614 (2d Cir. 1967). Rule 41(e), F.R.Cr.P., provides that a "person aggrieved" has standing to suppress illegally seized evidence. A "person aggrieved" is:

- 1) A person on the premises at the time of the contested search; or
- 2) A person alleging a proprietary or possessory interest in the premises searched; or
- 3) A person charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search.

Brown v. United States, 411 U.S. 223 (1973).

A person "aggrieved solely by the introduction of damaging evidence" does not have standing; "only those

whose rights were violated by the search" may successfully urge suppression. *Alderman v. United States*, 394 U.S. 165, 171-2 (1969). In fact, Judge Friendly has pointed out that:

The values that the Fourth Amendment protects are sufficiently advanced by excluding the results of illegal searches and seizures at the behest of "victims" . . . ; we see no important purpose to be served by holding that a thief who has left evidence of this crime [here stolen property] on the premises of a confederate is subrogated to the latter's right to complain of a search and seizure, so that he may exercise this although the confederate has not elected to do so. . . . *United States v. Bozza*, 365 F.2d 206, 223 (2d Cir. 1966).

The Second Circuit Court of Appeals has recently reaffirmed this position in *United States v. Galante*, 547 F.2d 733, 738-740 (2d Cir. 1976), which makes clear that something more than a possessory interest in contraband must be present to accord standing to a defendant objecting to a search.

Since appellant was unable to show his presence on the scene at the time of the search or show an interest in the premises, he had failed to meet his burden of showing standing. See *United States v. Sacco*, 436 F.2d 780, 783-784 (2d Cir. 1971), *cert. denied*, 404 U.S. 834.

C. The Car That Toth Was Driving Was Legally Stopped And The Subsequent Search Was Reasonable Under The Fourth Amendment

The Second Circuit, interpreting the Supreme Court line of cases beginning with *Terry v. Ohio*, 392 U.S. 1 (1968) and extending through *Adams v. Williams*, 407

U.S. 143 (1972) and *United States v. Bugnoni-Ponce*, 422 U.S. 873 (1975), has held that brief investigative stops based on reasonable suspicion are constitutionally justified. See *United States v. Magda*, No. 76-1298 (2d Cir., Dec. 22, 1976) and the cases cited therein. In *Adams, supra*, the Court stated that:

A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of facts known to the officer at the time. 407 U.S. at 147.

When the person to be stopped is driving a car, rather than walking, an additional rationale for stopping the individual arises. As the Court pointed out in *Bugnoni-Ponce, supra*, despite the fact that the border patrol may not reasonably stop cars at random beyond the immediate border area to check for illegal aliens, this holding

does not imply that state and local enforcement agencies are without power to conduct such limited stops as are necessary to enforce laws regarding drivers' licenses, vehicle registration . . . and similar matters. (422 U.S. at 883, n.8).

It seems only logical that a local law enforcement officer with some suspicion arising from the behavior of the occupants of a car may reasonably make a limited stop, involving minimal intrusion on the privacy of the occupants, for the purpose of ascertaining the identity of the individuals in the car and verifying that applicable traffic laws are being complied with.

In this case, the local police officers had conducted surveillance of two automobiles which had caused the cars' occupants to become aware of the police presence. The occupants' behavior, including anxious observation of

the police car and evasive maneuvers calculated to lose the police (77), was sufficient to raise a reasonable suspicion in the police officers that criminal activity was afoot. In addition, one of those car was located by the police in an area which had a high incidence of burglary and theft (see p. 6, *supra*).

The reasonableness of police conduct is determined by balancing the need for the stop against the gravity of the intrusion—which consisted here of a temporary detention, at least as contemplated by the officers at the time, for the limited purpose of investigative questioning. Indeed, the officer who stopped Toth's car merely made a routine request to see Toth's license and registration. The police would have been derelict in their duties if they had not attempted to ascertain the reason for Toth's earlier conduct, which had aroused their suspicion. And as soon as Officer DiBlassis determined that Toth could not produce either a driver's license or registration for the Ford that he was driving, and observed in plain view that the ignition lock of the car was "punched out", he placed Toth under arrest. Having arrested Toth, the officer was constitutionally empowered to conduct a search of the car and Toth's person as incident to the lawful arrest. *Adams v. Williams, supra*; *Gustafson v. Florida*, 414 U.S. 260 (1973). A search incident to an arrest is designed to protect the safety of the police by permitting them to remove any weapons from the immediate vicinity of the arrestee and to prevent the destruction of any evidence. *United States v. Robinson*, 414 U.S. 218 (1973). The courts have consistently found, in keeping with *Chimel v. California*, 395 U.S. 752 S.Ct. 2034, 23 L.Ed. 2d 685 (1969), that the search of a vehicle incident to the arrest of a defendant is proper. *United States v. Gonzales-Rodriguez*, 513 F.2d 928 (9th Cir. 1975); *United States v. Klugman*, 506 F.2d 1378 (8th Cir. 1974); *United States v. Crane*, 499 F.2d 1385 (6th Cir. 1974); *United*

States v. Marshall, 499 F.2d 76 (5th Cir. 1974); *United States v. Maddox*, 913 F. Supp. 60 (W.D. Oklahoma, 1976). The importance of this cannot be underestimated; the search did reveal a loaded .32 caliber pistol and a loaded sawed-off shotgun.

Clearly the Yonkers police officers here had the requisite reasonable suspicion to stop appellant Toth and Seifert for investigative questioning. Once Toth was stopped, it became apparent that the car all three had been riding in had been stolen. There was probable cause to arrest all three as well as to make all necessary searches incident to those arrests. Moreover, in the case of *United States v. Zaicek*, 519 F.2d 412, 414-415 (2d Cir. 1975), this Court held that the police may properly search a vehicle without a warrant where, as here, there is good reason to believe it stolen.³

In short, the arrests and subsequent searches were proper and all evidence seized admissible.

POINT IV

The Testimony Of The Accomplice Toth Was Properly Admitted Into Evidence.

There is likewise no merit to appellant's related contention (Br. 14-15) that Toth's testimony should have been excluded.⁴ This contention is based solely on the premise that the arrest of Toth and the search of the stolen Ford were illegal. As we have shown, however, the search and arrest were valid and proper, and in any event appellant has no standing to object to them.

³ Here the police interest in the car as given by statute, New York Vehicle and Traffic Law § 424(3) (McKinney's Consol. Laws C. 71, 1970), far surmounted the inferior if not non-existent interest of appellant.

⁴ It should be noted that there is no record evidence of how Toth came to testify for the Government.

POINT V

Evidence Of Subsequent Similar Acts Was Properly Admitted By The District Court.

Another of appellant's contentions (Br. 19-21) is that the district court should have excluded evidence of "subsequent similar acts". The evidence to which appellant refers is Toth's testimony regarding the planned robbery on August 2, 1976.

The rule in this circuit regarding evidence of other similar crimes is an inclusionary one, that is, such evidence is admissible "*for all purposes*" except to show the criminal character or disposition of the defendant, *United States v. Keilly*, 445 F.2d 1285, 1288 (2d Cir. 1971) (emphasis added). Accord: *United States v. Gerry*, 515 F.2d 130 (2d Cir. 1975), *cert. denied*, 423 U.S. 832 (1975); *United States v. Deaton*, 381 F.2d 114 (2d Cir. 1967). It is clear that such acts may be either prior or subsequent in time to the commission of the crime charged. *United States v. Diorio*, 451 F.2d 21 (2d Cir. 1971), *cert. denied*, 405 U.S. 955 (1972); *United States v. Super*, 492 F.2d 319 (2d Cir. 1974), *cert. denied sub nom, Burns v. United States*, 419 U.S. 876 (1974); *United States v. Nathan*, 476 F.2d 456, 460 (2d Cir. 1973), *cert. denied*, 414 U.S. 823 (1973).

Rule 404(b) of the Federal Rules of Evidence allows evidence of such crimes to be admitted to prove motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistakes or accident. See also Wigmore Evidence Section 300 at 192-193 (3d Ed. 1940). And the cases interpreting Rule 404(b) indicate that, in determining whether the evidence of subsequent acts is admissible, "the exercise of discretion must be addressed to the balancing of the probative value of the proffered

evidence, on the one hand, against its prejudicial character on the other." *United States v. Byrd*, 352 F.2d 570, 375 (2d Cir. 1965); See also *United States v. Brettholz*, 485 F.2d 483 (2d Cir. 1973), *cert. denied sub nom Santiago v. United States*, 415 U.S. 976 (1974).

Clearly, the evidence of the August 2, 1976, attempted bank robbery in Westchester County was an inextricable part of the overall scheme or plan of the appellant and his accomplices of which the Citibank was but one small part. It is settled that such evidence may be introduced in order to show the ongoing conspiracy. This circuit has consistently followed its decision in *United States v. Nathan*, *supra*, that "evidence of a conspirator's post-conspiracy activity is admissible if probative of the existence of a conspiracy or the participation of the alleged conspirator."⁵ *Id.* at 460. See also *United States v. Bennett*, 409 F.2d 888, 893 (2d Cir. 1969), *cert. denied*, 396 U.S. 852 (1969); *United States v. Super*, *supra* at 323. The balance of scales tips in favor of admission of the evidence where, as here, there is a logical nexus to the offense charged, *United States v. Bozza*, 365 F.2d 206, 213 (2d Cir. 1966); *United States v. Campanile*, 516 F.2d 288, 292 (2d Cir. 1975); *United States v. Baker*, 419 F.2d 83, 86 (2d Cir. 1969), *cert. denied*, 397 U.S. 971 (1970). In addition to proving a conspiracy, such evidence bore heavily on the question of the identity of appellant as the robber. As such, the evidence fell clearly within the parameters of Rule 404(b).

Evidence of the subsequent similar act also permitted the jury to understand how the government came upon the evidence. The physical evidence seized on August 2nd

⁵ According, it is insignificant that the planned August 2 robbery extended beyond the dates of the conspiracy alleged in the indictment. (*Cf.* Appellant's Brief, p. 19).

and 3rd directly linked appellant with the July 27th bank robbery by conclusively tying appellant to the shotgun, mask, gloves and bait money from the July 27, 1976, robbery.

Furthermore, the district court charged the jury that the evidence of the similar act on August 2, 1976, could be considered by them only in determining the existence of a conspiracy and not for any other purpose. The judge emphasized that only the evidence and testimony specifically relating to the bank robbery on July 27, 1976, could be considered by the jurors in deciding the guilt of the appellant on the substantive counts of the indictment (326). For these reasons, the evidence of the subsequent similar act was properly admitted by the court.

POINT VI

Defendants Remaining Arguments Are Frivolous.

Appellant also claims (Br. 16-18) that the Government introduced impermissible hearsay. Appellant first claims that Detective DeBlassis was testifying to hearsay when he stated that a bag containing a wallet with appellant's papers and fingerprints and bait money was in a garden at a location near where appellant had been walking (205). Such testimony clearly was not hearsay since Detective DeBlassis testified that he had seen appellant walking in the area prior to stopping Toth (186) and after that Detective DeBlassis had seen the location where the Cadillac had been abandoned by appellant (189).

Equally frivolous is appellant's contention (Br. 16) that he was seriously prejudiced by Detective DeBlassis' testimony to the effect that he found appellant's bag in the same condition as Mrs. Moore found it. Detective DeBlassis made that statement in response to a direct question during appellant's cross-examination. Ap-

pellant made no motion to strike the answer and in fact pursued this line of questioning (210).

Dated: Brooklyn, New York
October 20, 1977

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

HARVEY M. STONE,
BARRY E. SCHULMAN,
Assistant United States Attorneys,
(Of Counsel).

The United States Attorney's Office wishes to express appreciation to Dorothy Whitney, a Second-Year Student at Brooklyn Law School, and Sara Schoenwetter, a Third-Year Student at Brooklyn Law School, for their assistance in the preparation of this brief.

★ U. S. Government Printing Office 1977—

714-060-140

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Barbara Allen

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 25th day of October 77 he served a copy of the within
Brief For The Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Roger Milch, Esq.

14 Mamaroneck Ave.

White Plains, N.Y. 10601

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County of Kings, City of New York.

Barbara Allen

Sworn to before me this

25th day of Oct. 1977

Martha Schare

MARTHA SCHARE
Notary Public, State of New York
No. 24-3480350
Qualified in Kings County
Commission Expires March 30, 1979